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Nos. 81-2147 and 81-2188
(Consolidated)

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO TRIBE OF INDIANS, et al.

Respondents.

THE STATE OF MONTANA, et al.

Petitioners,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE, STATE OF WASHINGTON, STATE OF UTAH AND STATE OF IDAHO

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BRIEF OF AMICI CURIAE, STATE OF WASHINGTON, STATE OF UTAH AND STATE OF IDAHO

The State of Washington, through its attorney general, files this brief amicus curiae in accordance with Rule 36 of the Court. This brief is submitted in support of the petitioners, the States of Arizona and Montana.*

*The States of Idaho and Utah, through their attorneys general, join in the submittal of this brief.

STATEMENT OF INTEREST

The State of Washington is a disclaimer state.[1]

During the 1960's and 1970's, courts of Washington State, relying upon 43 U.S.C.A. § 666 (commonly referred to as the McCarran Amendment), have processed claims by the United States for Indian reserved water rights in general adjudication of water right proceedings. Not once, during those two decades, was any suggestion or hint raised by the United States (or any other party) that, as a disclaimer state, Washington's courts were barred from determining the validity of such claims.[2]

Since 1962, Washington State courts have ruled upon United States' claims for Indian reserved rights (or are now in the process of so doing) in four general adjudications.[3] The most important of these, *In re Yakima River*, Yakima County Superior Court No. 77-2-01484-5 (filed 1977), involves more than five-thousand five hundred served defendants and more than two-thousand water right claimants, including the United States as a claimant for Indian reserved water rights (pertaining to the Yakima Indian Reservation).

The interest of the State of Washington in this case arises from the direct threat to the sound, successful

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[1]Washington and Montana entered the federal union under the same federal "enabling" act. *Act of February 22, 1889, ch. 180, Sec. 4, 25 Stat. 676.*

[2]It was not until the second year of the 1980's that a challenge by the United States was made to state court jurisdiction based upon a disclaimer clause. See footnote 8 for a description of that short-lived challenge.

[3]The four adjudications are:

(1) *In re Chiliwist Creek*, Okanogan County No. 16323 (filed January 16, 1961, final decree entered May 16, 1967).

(2) *In re Bonaparte Creek*, Okanogan County No. 17787 (filed December 27, 1968, final decree entered December 14, 1979).

(3) *In re Antoine Creek*, Chelan County No. 34113 (filed March 31, 1980, now being processed).

(4) *In re Yakima River*, Yakima County No. 77-2-01484-5 (filed October 12, 1977, now being processed).

administration of the state's water right laws brought about by the Court of Appeals' decisions now on review by this Court. Those decisions, if left to stand, will undermine the very foundation of this and every other disclaimer state's program of water rights regulation — the "general adjudication."

In order to provide the Court with a better understanding of the nature and extent of Washington's interest, especially with regard to its role in the administration of water right law within our federal system, the following background is provided.

A. THE DOMINANCE OF STATE WATER RIGHTS LAW — THE DEVELOPMENT OF CENTRALLY ADMINISTERED UNITARY WATER CODES.

1. National Policy

National water right allocation policy has been, for more than a century, one of deference to state law. As a result, state water right laws, especially in the arid western United States, have dominated, historically, the creation and regulation of water rights within our federal system. This historical development has been detailed very recently by this Court in *California v. United States*, 438 U.S. 645 (1978) and in *United States v. New Mexico*, 438 U.S. 696 (1978).

2. State Water Codes

The water right laws of the western states are comprehensive and complex enactments. Dewsnup and Jensen, *A Summary Digest of State Water Laws*, chapter 2 (1973). These codes embody a centralized state administration covering all phases of water rights from the planning for and creation of new water rights to the regulation and termination of existing rights.[4]

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[4]Washington's surface and ground water codes are codified in chapters 90.03 and 90.44 RCW.

3. The "General Adjudication"

A foundation feature of western states' water codes is the "general adjudication" (or "general determination") process. II Hutchins, *Water Rights Laws in the Western United States,* chapter 15 (1974). This process, a special form of quiet title action, provides generally for all claimants to water rights within a stream system to be joined in one judicial proceeding for the purpose of proving their claims and, if they desire, contesting the claims of others. Ultimately, the process concludes with the entry of a final judgment setting forth the existing water rights and correlating each one as against every other in terms of priority of exercise of the right. The benefits derived from a completed general adjudication proceeding were described in *Pacific Live Stock Co. v. Lewis,* 241 U.S. 1084, 1096 (1916), as follows:

> It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible and may not be dependent upon the testimony of witnesses, with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

B. THE FEDERAL RESERVED RIGHTS DOCTRINE.

Consistent with the longstanding federal policy of deference to state water rights laws, the vast majority of water rights now existing in the western states have been established under state law, statutory or common. However, water rights have also been established by the United States outside of state law, i.e., based upon federal

law, under the so-called "reserved rights" doctrine.[5] *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696, 702 (1978); *Winters v. United States*, 207 U.S. 564 (1908). These rights, *held almost entirely by the United States*, relate to the use of water on public lands set aside by the United States for a special purpose, e.g., national parks, national forests, and Indian reservations. *Cappaert, supra.*

C. THE SOVEREIGN IMMUNITY OF THE UNITED STATES.

Prior to 1952, the effectiveness of a state's general adjudication effort was impaired because the United States, by its sovereign immunity, could not be compelled to participate in state proceedings. See *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1128 (10th Cir., 1979), cert. denied, 444 U.S. 995 (1979); and see also, *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The magnitude of this impairment was, of course, dependent upon the extent of federal reserved lands within a state and its various river systems. However, in states like Washington, with numerous Indian reservations[6] or other federal reserves located within most of its major river systems, the absence of the United States did, indeed, cripple the effectiveness of the state's general adjudication process.

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[5]When the United States establishes a federal reservation by withdrawal of land from the public domain for specific federal purposes, the United States "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert, supra,* at 138.

[6]There are twenty-three Indian reservations in the State of Washington. The largest are the Colville — a reservation of approximately 1,300,000 acres located within the Columbia, San Poil and Okanogan River systems — and the Yakima — a reservation of approximately 1,000,000 acres located within the Yakima River system.

D. THE McCARRAN AMENDMENT — 43 U.S.C.A. § 666.

It was against this backdrop that the Congress, in 1952, enacted 43 U.S.C.A. § 666 — the aforenoted "McCarran Amendment." Its importance to effective state water rights adjudication and regulation efforts cannot be overstated. Moreover, we submit, it is decisive of the "disclaimer" issue of this case.

By this enactment, the United States consented to be joined as defendant-claimant in state court general adjudications. Thus, the barrier to full achievement of the objectives of a state general adjudication proceeding was removed. All water right claims of the United States, including those involving reserved rights held by the United States for Indians, became subject to determination and correlation in state court in the same manner as nonfederal claims. *Colorado River Water Conservation District, supra.* See also *United States v. District Court for Eagle County,* 401 U.S. 520 (1971).

E. THE WASHINGTON STATE COURT EXPERIENCE — TWO DECADES OF HARMONY UNDER THE McCARRAN AMENDMENT.

Thereafter, for nearly twenty years during the 1960's and 1970's, Washington State courts determined — without any disclaimer jurisdiction challenge by the United States or anyone else — the validity of Indian water right claims based on the federal reserved rights doctrine in general adjudication proceedings. *In re Chiliwist Creek,* Okanogan County No. 16323 (filed 1961), and *In re Bonaparte Creek,* Okanogan County No. 17787 (filed 1968).[7]

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[7]Note also that the United States did not appeal the state court determinations on the validity of reserved water right claims of the United States, in either case, although *In re Chiliwist* reached the Washington State Supreme Court on other issues. 77 Wn.2d 658, 466 P.2d 513 (1970).

Indeed, every court, federal or state, which dealt with such a challenge prior to the Court of Appeals' decisions now here on review, rejected the challenge. See, *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir., 1979), cert. denied 444 U.S. 995 (1979); *Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976); and *State of Washington v. Acquavella (In re Yakima River Drainage Basin), supra.*[8]

SUMMARY OF ARGUMENT

In 1952 Congress enacted 43 U.S.C.A. § 666. This "McCarran Amendment" removed the last obstacle to the full achievement of the objectives of general adjudication proceedings in state court by allowing all water right claims of the United States, including those for Indian reserved rights, to be determined in such state proceedings. The Court of Appeals, however, by misunderstanding the relationship between state "disclaimer" clauses, the McCarran Amendment, and Public

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[8]For reasons unknown to the State of Washington, this longstanding harmonious relationship between the United States and the State of Washington was interrupted for a short period — from October, 1981 to September, 1982. On October 23, 1981, four years after the state court "general adjudication" of the Yakima River was filed (*Acquavella, supra*) and after the United States had filed reserved water right claims for the Yakima Indians with the state court, the United States moved to dismiss the state court proceeding for lack of jurisdiction on disclaimer grounds. Six days *prior* to the Ninth Circuit Court of Appeals' decision in this case, on February 16, 1982, the Yakima County Superior Court denied the United States' motion. And thereafter, in response to a motion by the United States for reconsideration based on the Ninth Circuit's decision, the superior court, on April 13, 1982, declined to follow that decision and reaffirmed its ruling of February 16, 1982.

It should also be pointed out that the United States and the State of Washington are, after the short break, again in accord on the disclaimer issue. *Acquavella* is now before the Washington State Supreme Court on a petition for discretionary review, and that accord came about when the United States, in the course of proceedings pertaining to that petition, advised the Washington State Supreme Court that the two rulings of the superior court were correct.

Law 83-280, has incorrectly determined congressional intent. And, in so doing, it has impaired the ability of the overwhelming majority of western states to reach the full objectives of the water rights adjudication and regulation statutes contemplated by that 1952 federal enactment.[9]

In urging reversal of that decision we draw this Court's attention to the following three points:

(1) The "disclaims" portion of the disclaimer clauses in the federal Enabling Act and constitutions of Montana and Washington may well preclude the states from asserting a *proprietary* interest in Indian lands, i.e., title or ownership. However, it has no impact whatsoever upon the states' ability to exercise their *governmental* (or regulatory) power over those lands.

(2) The "absolute jurisdiction and control" portion of the disclaimer clauses does preclude disclaimer states from exercising governmental powers over Indian lands *unless Congress removes that barrier.* By enactment of the McCarran Amendment in 1952, however, Congress removed all barriers to state court "general adjudication" jurisdiction over Indian reserved water right claims of the United States arising from this portion of the disclaimer clause.

(3) Public Law 83-280, an enactment of 1953 erroneously relied upon by the Court of Appeals, has no relevance whatsoever to resolution of the issue of state court general adjudication jurisdiction. That is so because the subject of Indian water rights is, by express statutory exclusion, beyond the coverage of Public Law 83-280.

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[9]As pointed out to this Court by the Solicitor General of the Department of Justice, only four states — California, Colorado, Nevada, and Oregon — would be unaffected by the Court of Appeals' decision. Memorandum for the United States, 12-13. The barriers to the use of 43 U.S.C.A. § 666 contained in that decision would affect detrimentally eleven western states: Arizona, Montana, Washington, North Dakota, South Dakota, Idaho, Wyoming, Utah, Oklahoma, New Mexico, and Alaska.

ARGUMENT

DISCLAIMER CLAUSES OF FEDERAL ENABLING ACTS AND STATE CONSTITUTIONS, WHEN COUPLED WITH THE McCARRAN AMENDMENT, DO NOT BAR STATE COURTS FROM DETERMINING THE VALIDITY OF INDIAN RESERVED WATER RIGHT CLAIMS OF THE UNITED STATES IN GENERAL ADJUDICATION PROCEEDINGS OF STATE COURTS

A. THE DISCLAIMER CLAUSE

The disclaimer clause in both Montana's and Washington's enabling act, 25 Statutes at Large, chapter 180, page 676, (which is similar to those of other western states) provides in pertinent part:

> That *the people* inhabiting said proposed States do *agree* and declare *that they forever disclaim all right and title* to the unappropriated public lands lying within the boundaries thereof, and *to all lands* lying within said limits *owned or held by any Indian or Indian tribes;* and *that until the title thereto shall have been extinguished by the United States,* the same shall be and remain subject to the disposition of the United States, and *said Indian lands shall remain under the absolute jurisdiction and control of the Congress* of the United States. (Emphasis supplied.)

Two portions of this type of disclaimer clause have been said (erroneously, we submit) to be barriers to the exercise of state court "general adjudication" jurisdiction.

1. The "Disclaims" Portion

The first argument relates to a state's agreement, when it entered the federal union, that its residents "disclaim all right and title * * * to all lands * * * owned by any Indian or Indian tribes." In *Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1962), however, this Court expressly noted that:

> The disclaimer of right and title by the state was a

disclaimer of proprietary rather than governmental interest.[10]

2. The "Absolute Control and Jurisdiction of Congress" Portion

The second portion of a disclaimer clause which is said to pose a barrier to state court jurisdiction involves a state's agreement that "Indian lands shall remain under the absolute control and jurisdiction of the Congress." Again, however, *Kake, supra,* at 68, supplies the answer by emphasizing that "absolute control and jurisdiction" does not mean "exclusive." Thus, while a state court could not apply its general adjudication jurisdiction to Indian reserved rights without federal approval, Congress, acting under the power contemplated for exercise by the enabling act, may enact legislation allowing for its application.

B. THE McCARRAN AMENDMENT — THE REMOVAL OF ALL BARRIERS TO THE APPLICATION OF STATE COURT JURISDICTION.

And, in turn, that is exactly what Congress did by its enactment, in 1952, of the McCarran Amendment. As a matter of federal law since then, state courts may now determine the validity of Indian reserved water right claims of the United States. Accord, *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976); and see also, *United States v. District Court for Eagle County,* 401 U.S. 520 (1971). The barrier to state court jurisdiction over Indian interests was removed in the fashion expressly contemplated by the second portion of

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[10]Accord, *White Mountain Apache Tribe v. Arizona,* 649 F.2d 1274, 1280 (9th Cir. 1981): "* * * proprietary interest in Indian land, not the state's governmental or regulatory authority * * *" are disclaimed by a state under a disclaimer provision. For support of the restrictive nature of a disclaimer provision, written shortly after Montana entered the Union, see *Draper v. United States,* 164 U.S. 240 (1896).

the disclaimer clauses. Congress, in the exercise of its "absolute control and jurisdiction," determined that state courts may apply their general adjudication laws to Indian reserved rights.

C. SUMMARY.

Under *existing* federal law, therefore, no barriers to state court jurisdiction arise from disclaimer clauses. *Kake, supra,* and *Colorado River Water Conservation District, supra,* when coupled, stand for the proposition that Congress may allow courts of a disclaimer state to exercise jurisdiction over Indian property interests without modification of either a federal or state disclaimer clause. They further hold, in combination, that by the enactment of the McCarran Amendment — 43 U.S.C.A. § 666 — Congress has authorized the validity of Indian reserved rights to be determined in general adjudications conducted by courts of disclaimer states.

D. THE COURT OF APPEALS' ERRONEOUS RELIANCE UPON PUBLIC LAW 83-280 — AN IRRELEVANCY.

One year after the enactment of the McCarran Amendment, another federal law was enacted authorizing, under certain circumstances, the application of various criminal and civil laws of a state to Indians and Indian reservations. Public Law 83-280, 67 Stat. 588 (1953). However, section 4(b) of that act (28 U.S.C.A. § 1360(b)) excluded the subject of water rights from the scope of this 1953 legislation by providing in pertinent part:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights,* belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States
> * * *

nor shall it

> * * * confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the

ownership or right to possession of such property or any interest therein.

Notwithstanding this express exclusion, and even after quoting section 4(b), the Court of Appeals concluded that the provisions of Public Law 83-280 must be satisfied before a state court may exercise general adjudication jurisdiction over Indian reserved rights.

Many errors followed therefrom. For example, the Court of Appeals concluded erroneously that a state is required to repeal its constitutional disclaimer clause before its courts may exercise its general adjudication jurisdiction. Likewise, the court held that, after 1968, no state court could exercise such jurisdiction at all — without the consent of an Indian tribe — because of amendments to Public Law 83-280. *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080, 1085 (9th Cir. 1982).

The Court of Appeals' determination that Public Law 83-280 is relevant, viewed in the light of section 4(b), *supra*, is hard to explain. The Court's confusion is particularly evident from its treatment of this Court's description of the impact of the water rights exclusion provision of Public Law 83-280 upon the McCarran Amendment as set forth in *Colorado River Water Conservation District*, *supra*, footnote 20, 424 U.S. at 812. There, this Court stated that the exclusion of water rights provision "only qualifies the *general* consent to state jurisdiction" given by Public Law 83-280. That provision, however, "does not purport to limit the *special* consent given by the McCarran Amendment." (Emphasis supplied.)

The teaching of this Court in footnote 20 is straightforward. The McCarran Amendment is a special consent to state court jurisdiction over reserved water rights, Indian and non-Indian, which is not limited by the general provisions of Public Law 83-280.[11]

[11]Footnote 20 was apparently included by this Court in response to the contention, made by several Indian tribes as *amici curiae* in *Colorado River Water Conservation District*, that consent to state court jurisdiction in general adjudication proceedings in disclaimer states was controlled by Public Law 83-280.

CONCLUSION

Whether a barrier exists to a disclaimer state's application of its general adjudication laws to Indian reserved rights depends upon the extent of Congress' exercise of its "absolute jurisdiction and control" over Indian interests as that power is described in disclaimer clauses. If Congress authorizes a state to so apply its laws, as it did in 1952 with the enactment of the McCarran Amendment, a state may do so. With the enactment of that congressional authorization, thereafter, there are no longer any barriers to the application to Indian reserved right-claims of the United States of the general adjudication laws of even a disclaimer state — such as Arizona, Montana, or Washington.

The Court of Appeals' decisions pertaining to the disclaimer clause should be reversed.

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Respectfully submitted.

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